Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

82-1403

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

INTERNATIONAL FASHIONS,

Petitioner,

vs.

ANGELA MARIE BUCHANAN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT GLENN WHITE
350 South Figueroa Street
Suite 460
Los Angeles, California 90071
(213) 626-8367

Attorney for Petitioner

QUESTIONS PRESENTED

1. DO THE SECTION 9(a) RECOVERY RIGHTS OF THE TRADING WITH THE ENEMY ACT APPLY TO ALL SECTION 5(b) ACTIONS WHICH TRANSFER A UNITED STATES CITIZEN'S PROPERTY INTERESTS TO A GOVERNMENT AGENCY?

2. IF THEY DO, SHOULD THE PETITIONER PROSECUTE ITS SECTION 9(a) CLAIM IN THE UNITED STATES DISTRICT COURTS OR IN THE UNITED STATES COURT OF INTERNATIONAL TRADE?

PARTIES TO THE PROCEEDINGS

INTERNATIONAL FASHIONS,

PETITIONER, 1/

v.

ANGELA MARIA BUCHANAN, TREASURER OF THE UNITED STATES; DONALD T. REGAN, SECRETARY OF THE TREASURY; WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES; WILLIAM T. ARCHEY, ACTING COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE

RESPONDENTS.

1/ The petitioner is a corporation but with no corporate relationships as required to be identified by Rule 28.1

TABLE OF CONTENTS

	Page
Table of Authorities	(iii)
Title Page	1
Opinions Below	2
Jurisdiction	4
Constitutional and Statutory Provisions Involved	4
Statement of the Case	5
Reasons for Granting the Writ	13
Argument:	
I. Limiting §9(a) to War-Time Seizures and Vestings Conflicts with Decisions of This and Other Courts Holding that Section Integral to All of §5(b) and Essential to The Constitutionality of the TWEA Itself	15
II. The Lower Court is Fully Equipped With the Powers Necessary to Give the Relief Contemplated by the TWEA	32
CONCLUSION	34

APPENDIX

	Page
Complaint	1a
Answer	16a
International Fashions, et al v. Angela Marie Buchanan, et al., Slip Op. 81-122, United States Court of International Trade, before Judge Boe	26a
Alcan Sales, Div. of Alcan Aluminum Corp., v. The United States, Slip Op. 81-121, United States Court of International Trade, before Judge Boe	43a
International Fashions, v. Angela Marie Buchanan, et al., App. No. 82-16, United States Court of Appeals for the Federal Circuit	74a
Alcan Sales, Div. of Alcan Aluminum Corp. v. The United States, Appeal No. 82-17, United States Court of Appeals for the Federal Circuit	77a
Statues in Appendix	
Fifth Amendment to the Constitution of the United States	98a
Section 5(b), 50 U.S.C. App. (1970)	98a

Page

Section 7(c), 50 U.S.C. App. (1970) 100a

Section 9(a), 50 U.S.C. App. (1970) 102a

28 U.S.C. §1585, as added by Pub.L. 96-417, 94 Stat. 1730 105a

TABLE OF AUTHORITIES

Cases Cited:

Alcan Sales, Div. of Alcan Aluminum Corp. v. United States, 534 F.2d 920, 63 CCPA 83, C.A.D. 1170, cert. denied, 429 U.S. 986, 50 L.Ed. 2d 598 (1976) 7

Becker Steel Co. v. Cummings, 296 U.S. 74, 80 L.Ed. 54 (1935) 25

Brownell v. Ketcham Wire & Mfg. Co., 211 F.2d 121 (9th Cir. 1954) 19,32

Clark v. Uebersee Finanz-Korp., 332 U.S. 480, 92 L.Ed. 88 (1947) 26,31

Cornet Stores, et al. v. Morton, et al., 632 F.2d 96 (9th Cir. 1980), cert. denied, 68 L.Ed. 2d 324 (1981) 9,33

Dames & Moore v. Regan, ___ U.S. ___, 69 L.Ed.2d 918 (1981) 22

	Page
Draeger Shipping Co. v. Crowley, 49 F.Supp. 215 (S.D.N.Y. 1943)	26,28
Guessefeldt v. McGrath, 342 U.S. 308, 96 L.Ed. 342 (1952)	25
Josephberg et al. v. Markham, 152 F.2d 644 (2d Cir. 1945)	25
Markham v. Cabell, 326 U.S. 404, 90 L.Ed. 165 (1945)	17,19
Henry Pollak, Inc. v. Blumenthal, 444 F.Supp. 56, aff'd. mem., 593 F.2d 1371 (D.C. Cir.), cert. denied, 444 U.S. 836, 62 L.Ed.2d 46 (1979)	9,33
Real v. Simon, 510 F.2d 557, (5th Cir. 1975)	20,22
Richardson v. Simon, 560 F.2d 500 (2nd Cir. 1977)	20, 21,22
Uebersee Finanz-Korporation v. Markham, 158 F.2d 313 (D.C. Cir. 1946)	30
United States v. Yoshida International, Inc., 526 F.2d 560, 63 CCPA 15, C.A.D. 1160 (1975)	7

Page

Statues (Other than §§5(b), 9(a), TWEA):

28 U.S.C. §1585, as added by Pub.L. 96-417, 94 Stat. 1730, 1747 — 33

Legislative Materials:

HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, ON H.R. 4704, 65th Cong., 1st Sess., 1917 — 24

1941 U.S. Code Cong. Service 1029; H.R. Comm. on Judiciary Doc. No. 1507, Dec. 15, 1941 — 17

Other:

Dulles, The Vesting Powers of the Alien Property Custodian, 28 CORNELL L.Q. 245 (1943) — 28

McNulty, Constitutionality of Alien Property Controls, 11 L.& CONTEMP. PROB. 135 (1945) — 28

Wechsler, Constitutionality of Alien Property Controls: A Comment on the Problem of Remedies, 11 L. & CONTEMP. PROB. 149 (1945) — 29

Page

THE LOS ANGELES TIMES,
February 5, 1983 22

THE WALL STREET JOURNAL,
August 15, 1981 23

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

----------0----------

INTERNATIONAL FASHIONS,

PETITIONER,

V.

ANGELA MARIE BUCHANAN, ET AL.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The petitioner seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit affirming the dismissal of its action for failure to state a claim upon which relief could be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit was issued, per curiam, on November 18, 1982. It will not be published. It is reproduced in the Appendix to this petition, at pp. 74a through 76a.

The trial court's opinion was published, 534 F.Supp. 828 (U.S. Court of International Trade, 1981). It also is reproduced in the Appendix to this petition, at pp. 26a through 42a.

At the trial level, the Court of International Trade found it had subject matter jurisdiction, and that the matter was not barred by any applicable statute of limitations. It found that this petitioner's Complaint failed to state a cause of action on which relief could be granted. That complaint is reproduced in

the Appendix, at pp. 1a through 15a. In doing so it relied on a companion case it also decided that same day, Alcan Sales v. United States, 528 F.Supp. 1154 (1981). That trial level decision is reproduced in the Appendix to this petition, at pp. 43a through 73a.

On review, the Court of Appeals for the Federal Circuit did not reach the subject matter and plea in abatement issues discussed by the trial court, but relied entirely on its reasoning in the same companion case, Alcan Sales v. United States, 693 F.2d 1089 (Fed. Cir. App. No. 82-17, November 18, 1982). In the companion case, however, the Court of Appeals for the Federal Circuit did say that if a claim under Section 9(a) of the Trading With the Enemy Act (50 U.S.C. App. §§ 1-6, 7-39, 41-44 (1970)) exists,

the exclusive remedy would be in the district courts. The opinion in that companion case is reproduced in the Appendix to this petition, at pp. 77a through 97a.

JURISDICTION

This court has jurisdiction to review this case pursuant to 28 U.S.C. §1256(1976). The judgment of the Court of Appeals for the Federal Circuit was entered on November 18, 1982. The mandate was also entered on November 18, 1982.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED[1]

Constitution of the United States,

1/ All provisions, statutes and proclamations involved are set out verbatim in the Appendix to this petition, beginning at p. 98a

Amendment V, in pertinent parts:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 5(b), Trading With the Enemy Act, 50 U.S.C. App. §5(b)(1970).

Section 7(c), Trading With the Enemy Act, 50 U.S.C. App. §7(c)(1970).

Section 9(a), Trading With the Enemy Act, 50 U.S.C. App. 9(a)(1970).

28 U.S.C. §1585, as added by Public L. 96-417, 94 Stat. 1730, 1747.

STATEMENT OF THE CASE

This is an action under the Trading With the Enemy Act, 50 U.S.C. App. §§ 1-6, 7-39, 41-44 (1970) (hereinafter cited as TWEA), and Section 9(a) thereof, for return of property interests taken by action of the Chief Executive in 1971.

It has reached a decisional level ripe for review of the merits of the petitioner's TWEA recovery claim itself only after two sequential sets of law suits. The first of those two sets of law suits was necessary to initially identify to the public the specific constitutional authority for the exactions made by presidential proclamation - the TWEA. The second set of law suits served to identify the proper forum for prosecution of such TWEA claims - the specialized United States Court of International Trade.

While there had been no reference to the TWEA as authority for decreeing the exaction of monies amounting to ten percent (10%) ad valorem or diverse dutiable merchandise importations on August 15, 1971, the courts in the first set of cases considered the argument on the ap-

plicability of that Act, and eventually found and held, on appeal, that the sole constitutional authority for such action existed only in the TWEA, and Section 5(b) thereof. United States v. Yoshida International, Inc., 526 F.2d 560, 63 CCPA 15, C.A.D. 1160(1975) (See 378 F. Supp. 1155, 1168, 73 Cust. Ct. 1, 16, C.D. 4450, July 8, 1974, for the trial court's view on its obligation to consider the application of the previously uncited TWEA). Accord, Alcan Sales, Div. of Alumunium Corp. v. United States, 534 F.2d 921, 63 CCPA 83, C.A.D. 1170, cert. denied, 429 U.S. 986 (1976).

The second set of cases were in consequence of those decisions, and in contemplation of the provisions of the TWEA (Section 9(a) thereof) which provide for return of monies taken from United States

citizens pursuant to its authority. Suit was brought by the petitioner in the United States District Court for the Central District of California seeking return of its property under Section 9(a) of the TWEA. Jurisdiction in the District Court was alleged to exist by reason of Section 7(c), TWEA, as well as 28 U.S.C. §§1337, 1361 (1970), and 28 U.S.C. §§1331 and 1391(e)(1970), as amended by the Act of October 21, 1976, Pub.L. 94-574, 90 Stat. 2721. On motion of the defendants, in that case (the predecessor office holders to the Respondents herein), the district courts dismissed that action on grounds of subject matter jurisdiction, holding that the United States Customs Court had exclusive jurisdiction. The District Court's memorandum opinion was not published.

After consolidation with several companion cases in the District Court for the Central District of California, an appeal was prosecuted in the Court of Appeals for the Ninth Circuit. The Ninth Circuit in its holding in that case, reported as Cornet Stores, et al. v. Morton, et al. 632 F.2d 96 (9th Cir. 1980), cert. denied, 451 U.S. 937 (1981) said that the regulatory action in question was a Customs matter within the exclusive subject matter jurisdiction of the Customs Court (now the Court of International Trade, Pub. L. 96-417, Sec. 702, 94 Stat. 1748), adding that to rule otherwise would violate congressional allocation of judicial responsibility over customs matters (632 F.2d, at 98). Accord, Henry Pollak, Inc. v. Blumenthal, 444 F.Supp. 56, 60, aff'd mem., 593 F.2d

1371, (D.C. Cir) cert. denied, 444 U.S. 836 (1979).

The petitioner then filed its TWEA claim action in the Court of International Trade, on June 11, 1981. That Complaint and the Answer thereto, are reproduced in the Appendix to this Petition, at pp. 1a - 25a. Petitioner alleged that jurisdiction in the Court of International Trade derived from 28 U.S.C. §1581(i), as amended by Pub.L. 96-417, 94 Stat. 1729; 28 U.S.C. §1585, as amended by Pub.L. 96-417, 94 Stat. 1730; and Section 9(a) of the TWEA.

The trial court, on December 29, 1981, denied the Respondents' motion to dismiss on grounds of lack of subject matter jurisdiction and on grounds of a plea in abatement. It granted the Respondents' Rule 56, Rules of the United

States Court of International Trade, motion for summary judgment, on the grounds that petitioner had not stated a cause of action under section 9(a) of the TWEA upon which relief could be granted. Section 9(a), TWEA, was held inapplicable as no "vesting" had taken place. It adopted without further elaboration its reasoning in the companion case of that same date, Alcan Sales, Div. of Alcan Aluminum Corp. v. United States, Court No. 77-8-01685(See pp. 40a-42a, Appendix hereto).

On appeal, the court of review in a per curiam memorandum similarily adopted its respective reasoning in that same companion case, now identified on appeal as Alcan Sales v. United States, Fed. Cir. App. No. 82-17, also decided that same day, November 18, 1982, and affirmed the

dismissal of the petitioner's claim.

In that companion case, the lower court said that no §9(a), TWEA, relief could be had as that provision authorizes a suit for recovery only when property interests are seized or vested. The regulatory powers of §5(b), TWEA, are distinct and independent from the seizure and vesting powers, the court of review said, and §9(a) applies only to the power to vest property. No vesting had occured here, and §9(a) was therefore deemed inapplicable. Though not essential to its holding in the context of that companion case, the lower court did opine in the course of its decision that if a §9(a) claim were to be found, then the remedy would be exclusively in the district court system (See p. 89a, Appendix herein).

REASONS FOR GRANTING THE WRIT

The decision of the court below introduces a conflict with decisions of other circuits construing the TWEA both in times of war and of peace. Whatever the national emergency context, all other courts, including this one, heretofore have uniformly construed the TWEA as not permitting confiscation of property interests of United States citizens when such citizens can demonstrate the bona fides of their property claim and personal status. The lower court's decision conflicts with this Court's decisions that have found the TWEA to pass constitutional muster only because of the preserved rights of judicial recovery recourse for U.S. citizens embodied in Section 9(a).

By finding that Section 5(b) in-

cludes regulatory powers which are unfettered ("distinct and independent") by the recovery rights of Section 9(a), the lower court for the first time has fragmented the TWEA into diverse powers that are isolated from the statutory whole - a construction rejected by this Court over three decades ago.

If the lower court's decision is allowed to stand, the TWEA will for the first time have been used as a defense to absolute confiscation of private property. For the future, in times of wartime emergencies the decision will put the citizen's property rights entirely at the pleasure of the Chief Executive's choice of means and limits of wit in articulating its TWEA powers.

As Section 9(a) is applicable to the property transfer in issue, the lower

court's decision creates a conflict with other circuits that have said that the choice of means of exercising TWEA authority confers jurisdiction on the Court of International Trade. The lower court's *dicta* should be resolved.

ARGUMENT

I

LIMITING §9(a) TO WAR-TIME SEIZURES AND VESTINGS CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS HOLDING THAT SECTION INTEGRAL TO ALL OF §5(b) AND ESSENTIAL TO THE CONSTITUIONALITY OF THE TWEA ITSELF

The lower court's decision is fashioned from two premises. The first, a statement characterizing statutory amendments, is factually incorrect. The second, a statement of statutory interpretation, was rejected decades ago.

The lower court erroneously says that amendments to §5(b) in 1933 and 1941

for the first time gave the President a "distinct and independent" power to regulate (Appendix, at 91a). In fact, §5(b) from its earliest enactment authorized the President to,

> "regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, ..., transfers of credit in any form ..., and transfers of evidence of ... the ownership of property between the United States and any foreign country, whether enemy, ally of enemy, or otherwise ..." (TWEA, October 6, 1917, 40 Stat. 415).

Those amendments, and particularly that of 1941, which for the first time added the word "importation" to the §5(b) direct object nouns (Act of Dec. 18, 1941, 55 Stat. 838, 839), were more accurately described by Congress itself as merely to put the country "on an immediate war footing ...," and to thereby

give the President the "flexible powers" he was felt to require to deal with all possible exigencies (1941 U.S. Code Cong. Service 1029, 1031; H.R. Comm. on Judiciary Doc. No. 1507, Dec. 15, 1941).

The rejection of the argument that the 1941 amendments to §5(b) gave the Chief Executive a more distinct and "more comprehensive power" to regulate which should not be subject to the burdensome litigation that 9(a) would create, was first rejected by this Court in Markham v. Cabell, 326 U.S. 404, 409-10, 90 L.Ed. 165, 168-69 (1945). This Court there said, most relevant here:

> "The right to sue, explicitely granted by §9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending §5(b) de-

> sired to delete or wholly nullify §9(a). On the contrary, the normal assumption is that where Congress amends only one section of the law, leaving another untouched, the two were designed to function as parts of an integral whole. We should give each as full a play as possible. ..." 316 U.S., at 410-11; 90 L.Ed., at 169.

That strong position of this Court was in direct response to the argument used by the United States that §5(b) empowered it to take diverse regulatory acts short of vesting for which there was no "remedy as a matter of right under the Act." 326 U.S., 409-10, 90 L.Ed., 169. While this Court at that time limited its decision to the right to maintain a suit on a debt, other courts came to meet head on the claim that the diverse regulatory acts of §5(b) were free of the remedial rights of §9(a).

The admonition approved by this Court in Markham, supra, that courts should not be led to a literal reading of the TWEA that would "make a fortress out of the dictionary" (326 U.S., at 409, 90 L.Ed., at 168), led the Court of Appeals for the Ninth Circuit to reject the argument, replicated by the lower court here, that where the government does "not vest any property or rights of" a claimant, the courts are without "jurisdiction to enter a judgment under the Trading With the Enemy Act; ..." (Brownell v. Ketcham Wire & Mfg. Co. 211 F.2d 121, 125 (9th Cir. 1954)). If the government acts under the TWEA in a manner that equates to an exercise of dominion over a citizen's property, the Ninth Circuit concluded, it is actionable under §9(a) (211 F.2d, at 127). Vesting is not a

condition precedent:

> "It makes little difference what name or language is used. We inquire into what was done and the result accomplished ..." (211 F.2d, at 126)

The lower courts' distinction between property transferred through regulatory action and through direct "vesting" action is not credible in the eyes of Brownell, supra.

The property claims at issue in the lower court are not the subject of freezing or blocking orders (Complaint and Answer, Paragraph 36; Appendix at pp. 12a, 23a), and are not being held for eventual resolution of any continuing international emergency. Considerations of unknown contingent future rapproachmant or claims settlements are not present here, as have been present in peacetime TWEA cases such as Richardson v.

Simon, 560 F.2d 500 (2d Cir. 1977), and Real v. Simon, 510 F.2d 557 (5th Cir. 1975), involving blocked Cuban assets. While those two circuits reached different results on largely identical claimant estate claim facts, it is clear that the Second Circuit would give the same remedial relief as did the Fifth Circuit had the emergency period with Cuba ended and there was no longer the need to leave our foreign relations decisions "to either the Legislature or the Executive" as the "light of changing political and economic circumstances" might require. Richardson v. Simon, 560 F.2d, at 504, citing Mathews v. Diaz, 426 U.S. 67, 81, 96 S.Ct. 1883, 1892, 48 L.Ed. 2d 478 (1976).

The lower court's decision that §5(b) "regulatory" actions are inapplicable to the remedial recovery rights of §9(a) is

in conflict with the decisions in Richardson and Real, supra. 1/

The speculations of the lower court to the effect that §9(a) might severely hinder the Chief Executive's ability to effectively deal with emergencies, par-

1/ In the recent case of Dames & Moore v. Regan, ___U.S. ___, 69 L.Ed. 2d 918, 935 (1981), decided in a time of grave crises of human life as well as property claim interests, this Court again declined to bifurcate the powers of §5(b) of the TWEA, albeit in dicta. This Court's careful insistence that the nullification of attachments did not also work the nullification of claims (69 L.Ed. 2d, at 937), that a forum still existed for providing remedial relief (69 L.Ed. 2d, at 994-45, 946), and its explicitely narrow conclusion that its decision did not extend to granting of plenary powers to the President (69 L.Ed. 2d, at 945), cumulatively reinforce the petitioner's assertion that §9(a) applies to all §5(b) actions. It is noted that the first such claim has apparently been satisified. See, Los Angeles Times, Part 1, page 15, column 3, Feb. 5, 1983, "Bank Collects $26.4 Million From Iran."

ticularly in the instance of import regulation [2/] were persons to "know that they "will possibly be able to recover their property exactions (Appendix, pp. 92a-93a), are disengenuous when it is recalled that the regulatory action in question had ended over two years prior to the time it was publicly known that §5(b) of the TWEA was one of the claimed bases of authority for the action taken. (Infra, at 7). As a matter of law it is contrary to the intent embodied in the TWEA by Congress and to the courts' con-

2/Recent reflections by the participants only underscore the principle that Courts should not indulge on the assumed meritorious effectiveness of Executive actions. See, Herbert Stein, "Remembering the Fifteenth of August," WALL STREET JOURNAL, Editorial page, August 15, 1981 ("Mr. Nixon has said that much of what was decided then was mistaken. Few will disagree."). The author was Chairman of the Council of Economic Advisors under President Nixon.

struction of the TWEA as an integral whole whose constitutionality is saved by §9(a).

The most succinct, though not solitary, statement of Congress's intent is that there was to be nothing in the TWEA,

> "that would prevent any loyal citizen of this country whose rights were infringed from bringing suit to enforce his rights against the custodian or anybody else." HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, ON H.R. 4704, 65th Cong., 1st Sess., 1917, at 54.

This court in 1935 upheld a §9(a) cause of action against the argument by the Attorney General and the Treasurer of the United States that as the property had been disposed of and was not "held" by them, there was a lack of jurisdiction, in the following words that stand in stark contrast to the view of the low-

er court in this case:

> "Such a construction does no violence to the language of this act and conforms to and is supported by its dominant purpose, often recognized by this Court, to give to citizens and alien friends an adequate remedy for invasions of their property rights in the exercise of the war powers of the government. Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies." Becker Steel Co. v. Cummings, 296 U.S. 74, 81, 80 L.Ed. 54, 60 (1935).

Accord, Guessefeldt v. McGrath, 392 U.S. 308, 319, 96 L.Ed. 342, 350 (1952)("Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited."); Josephberg et al. v. Markham, 152 F.2d 644, 649 (2d Cir. 1945) ("If the term 'resident' is held to include a United States citizen

... and the statute and orders are construed to provide for the seizure and withholding of his property ..., the failure to provide any remedy for its return or for just compensation to the owner ..., other than what §9(a) affords, would create such a doubt [as to its constitutionality]. ... (Citing cases.)"

The dispositive decision rejecting the argument that after 1941 §5(b) authorized regulatory acts not subject to the remedial recovery rights of §9(a), is Clark v. Uebersee Finanz-Korp., 332 U.S. 480, 92 L.Ed. 88 (1947). The genesis of that argument, and its eventual rejection in the Uebersee Finanz-Korp. case, however, was the interlocutory trial court decision in Draeger Shipping Co. v. Crowley, 49 F.Supp. 215 (S.D. N.Y.1943).

The plaintiff in Draegar Shipping Co.

had brought an action under §9(a), seeking to direct the Alien Property Custodian permit the individual plaintiff to continue to act as a corporation's president and not to liquidate the corporation but to continue to hold and operate it, under the APC's supervision and control, pending final adjudication of the TWEA action. The trial court granted the relief requested, specifically rejecting the government's theory that actions under §5(b), as amended in 1941, were independent of the remedial recovery rights of §9(a). The court said that if §5(b) as amended were "construed as unaffected by Section 9(a), it would depend upon the will of the President or his representative whether there should be even an administrative remedy and if so what it should be." (49 F.Supp., at 218).

Recognizing the Draeger Shipping Co. decision as subjecting all the diverse powers of §5(b) to the judicial review provision of §9(a), debate on the question was first prompted in professional journals. John Foster Dulles, for example, was quickly moved to publish an article arguing that §5(b) is "regulatory," and §9(a) should be inapplicable to its powers (Dulles, The Vesting Powers of the Alien Property Custodian, 28 CORNELL L.Q. 245, 254-55 (1943)). One George A. McNulty, chief of the Alien Property Unit, War Division, Department of Justice, and one of the attorneys of record in the Draeger Shipping Co. case, supra, based his argument against §9(a) on the point that §9(a) "authorizes actions only against the Alien Property Custodian or the Treasurer, not against

other officers." As there is no reference to an APC in §5(b), and it was "sheer coincidence that the President used that term to designate the new delegate of ..." his authority, §9(a) did not authorize suit relative to §5(b) regulatory actions. His research, he said, "confirms the thesis that a 9(a) remedy is available only as against actions taken under Section 7(c). ..." McNulty, Constitutionality of Alien Property Controls, 11 L. & CONTEMP. PROB. 135, 144, 145 (1945)(Emphasis quoted; footnotes omitted).

The head of the War Division, Department of Justice, one Herbert Wechsler, took the opposite position. He found it "difficult to limit remedies by the titles of particular officials rather than the functions to which they relate." He

preferred a construction of "Section 5(b), as amended, in the posture of which it was enacted, as an amendment, and, therefore, an organic part of the Trading With the Enemy Act ..." He concluded that in characterizing §5(b) as an amendment to the TWEA, "Congress placed it in organic relationship to the judicial remedy of return embodied in Section 9(a)." Wechsler, Constitutionality of Alien Property Controls: A Comment on the Problem of Remedies, 11 L & CONTEMP. PROB. 149, 150, 151 (1945).

The issue was first pressed in Uebersee Finanz-Korporation v. Markham, 158 F.2d 313 (D.C. Cir. 1946), where there had been a vesting order, purportedly under the authority of §5(b). The issue was presented in the first sentence of the appellate decision:

> "The decision in this case turns upon the question whether the amendment of §5(b) of the Trading with the Enemy Act by Title III of the First War Powers Act of 1941 has, by necessary implication, the effect of nullifying and rendering impotent §9(a) of the original Act." (Ibid; footnote omitted.)

The court answered in the negative.

In this Court, the Attorney General, substituted for APC defendant, argued that the application of §9(a) to §5(b) would "undo much of the good which the 1941 amendment to §5(b) was designed to accomplish. ..." This Court disagreed, saying it is preferable to give sections 2, 5(b), and 9(a), as amended, a construction which did not,

> "make §9(a) for the first time in its history and contrary to the normal connotation of its terms stand as a barrier to the recovery of property. ..." Clark v. Uebersee Finanz-Korp., 332 U.S. 480, 486, 489, 92 L.Ed. 88, 92, 94 (1947).

The lower court for the first time in history has created a barrier to a citizen's recovery of property taken under authority of the TWEA. As in Brownell v. Ketcham Wire & Mfg. Co., 211 F.2d 121 (9th Cir. 1954), supra, where the claimants' property interests also had not been the subject of any seizure or vesting, neither means nor names are controlling. The decision below should be reviewed by this Court, so that it may be known whether §9(a) may be nullified and rendered impotent by the Chief Executive's choice of means and agency for exercise of §5(b) authority.

II.

THE LOWER COURT IS FULLY EQUIPPED WITH THE POWERS NECESSARY TO GIVE THE RELIEF CONTEMPLATED BY THE TWEA

Two circuit courts have found the Court of International Trade to be the proper court to handle the TWEA claims in issue. Cornet Stores, et al v. Morton, et al. 632 F.2d 96, 98, 100 (9th Cir. 1980), cert. denied, 451 U.S. 937, 68 L.Ed. 2d 324 (1981); Henry Pollak, Inc. v. Blumenthal, 444 F.Supp. 56, 60, aff'd. mem., 593 F.2d 1371 (D.C. Cir.) cert. denied, 444 U.S. 836, 62 L.Ed.2d 46 (1979).

Those conclusions have been reinforced by the recent grant of full equity powers to that court by Congress (28 U.S.C. 1585, as added by Pub.L. 96-417, 94 Stat. 1730, 1747).

The lower courts contrary dicta on this point of jurisdiction should be reyiewed by this Court as the most economical, non-piece meal resolution of the

case in controversy.

CONCLUSION

The lower court's decision is in conflict with this Court's interpretation and application of §9(a) to all §5(b) actions. As a break with all prior precedence, definition of the powers under §5(b) and the application of §9(a) thereto is required anew.

Respectfully submitted,

Robert Glenn White
Attorney for Petitioner

350 South Figueroa Street
Suite 460
Los Angeles, California 90071
Telephone: (213) 626-8367

UNITED STATES COURT OF

INTERNATIONAL TRADE

BEFORE:

INTERNATIONAL FASHIONS, a corporation, Plaintiff, v. ANGELA MARIE BUCHANAN, Treasurer of the United States; DONALD T. REGAN, Secretary of the Treasury Department; WILLIAM FRENCH SMITH, Attorney General of the United States; WILLIAM T. ARCHEY, Acting Commissioner of Customs, United States Customs Service, Defendants.	COURT NO. 81-6-00744 PORT: Los Angeles, California COMPLAINT TO ESTABLISH CLAIM FOR MONIES AND FOR ORDER FOR PAYMENT AND DELIVERY; AND FOR RETURN OF MONIES UNLAWFULLY WITHHELD.

The plaintiff, by and through its attorneys of record, alleges as follows:

FIRST CAUSE OF ACTION

1. This action arises under Sections 9(a) and 9(c) of the Trading With The Enemy Act, 50 U.S.C. App. §§ 9(a), (c) (1970), and the Fifth Amendment to the Constitution of the United States.

2. This Court has jurisdiction over this action, and it is properly brought in this Court, under Title 28, U.S. Code, § 1581(i), as amended by Pub. L. 96-417, 94 Stat. 1729; 28 U.S.C. § 1585, as amended by Pub. L. 96-417, 94 Stat. 1730; and 50 U.S.C. App. § 9(a) (1970).

3. This is an action to establish ownership and title to monies held by the Treasurer of the United States, or others, of the defendants herein; and for payment and delivery of said monies as provided by Congress, and other relief.

4. The defendant ANGELA MARIE BUCHANAN is the Treasurer of the United

States. The defendant DONALD T. REGAN is the secretary of the Treasury of the United States. The defendant WILLIAM FRENCH SMITH is the Attorney General of the United States. The defendant WILLIAM T. ARCHEY is the Acting Commissioner of Customs, United States Customs Service, Department of the Treasury. All defendants are sued in their official capacities only.

5. Plaintiff is a corporation, organized and existing under the laws of States of the United States.

6. Plaintiff during the period August 16, 1971, through December 20, 1971, imported a variety of dutiable merchandise into the United States.

7. The merchandise imported by plaintiff into the United States during the period August 16, 1971, through De-

cember 20, 1971, were not products of Communist Countries, as defined by General Headnote 3(e) of the Tariff Schedules of the United States, 19 U.S.C. § 1202 (1970).

8. During the period August 16, 1971, through December 20, 1971, the defendants required the plaintiff to pay to the TREASURER OF THE UNITED STATES through the administration of the Bureau of Customs (since renamed United States Customs Service) of the Department of the Treasury monies amounting to ten percent (10%) ad valorem on all dutiable merchandise it imported into the United States.

9. The total amount of monies taken by and paid to the defendants, by the plaintiff as alleged in Paragraph 8 of this Complaint, was $56,791.64.

10. The monies taken by and paid to

the defendants, by the plaintiff as alleged in Paragraphs 8 and 9 of this Complaint, were taken and paid pursuant to Presidential Proclamation No. 4074, of August 15, 1971 (85 Stat. 926; hereinafter P.P. 4074).

11. In P.P. 4074, the President stated that his actions, implemented as alleged in Paragraph 8 of this Complaint, were authorized by the Tariff Act of 1930, as amended, the Trade Expansion Act of 1962, and the Constitution and other statutes.

12. In P.P. 4074, the Secretary of the Treasury was authorized to prescribe such rules and regulations as he determined to be necessary and appropriate to carry out the provisions of that proclamation.

13. In United States v. Yoshida In-

ternational, Inc., 63 CCPA 15, C.A.D. 1160, 526 F.2d 560 (Nov. 6, 1975), the Court of Customs and Patent Appeals reversed the decision of the United States Customs Court (73 Cust. Ct. 1, C.D. 4550, 378 F. Supp. 1155) which held and declared P.P. 4074 invalid.

14. The Trade Expansion Act of 1962 did not authorize the demanding, collecting and taking of monies from the plaintiff, as described in this Complaint, pursuant to P.P. 4074. The Court so held in United States v. Yoshida International, Inc., supra.

15. The Tariff Act of 1930, as amended, did not authorize the demanding, collecting and taking of monies from the plaintiffs, as described in this Complaint, pursuant to P.P. 4074. The Court so held in United States v. Yoshida In-

ternational, Inc., supra.

16. The Constitution of the United States did not authorize the demanding, collecting and taking of monies from the plaintiff, as described in this Complaint, pursuant to P.P. 4074. The Court so held in United States v. Yoshida International, Inc. supra.

17. The Trading With The Enemy Act, and Section 5(b) thereof, as amended, (50 U.S.C. App. §§ 1-39, 41-44 (1970)) (hereinafter, "TWEA"), was construed as authorizing the demanding, collecting and taking of monies from the plaintiff, as described in this Complaint, pursuant to P.P. 4074, in United States v. Yoshida International, Inc., supra.

18. The TWEA, including Section 5 (b) thereof, does not authorize the retention of property demanded of and taken

from a United States resident who is not an enemy or an ally of an enemy, as defined in Section 2 of the TWEA.

19. The intent and general policy of the TWEA is to prohibit the retention of property belonging to a United States resident not an enemy or ally of an enemy and taken under authority of that Act.

20. Under United States v. Yoshida International, Inc., supra, the monies taken from plaintiff, as described in this Complaint, were paid into the Treasury of the United States pursuant to Section 5(b) of the TWEA.

21. The ten percent (10) ad valorem monies the Secretary of the Treasury, through the agency of the Bureau of Customs, did demand of and take from plaintiff as alleged in the Complaint, was deposited to the credit of the Treasurer of

the United States, by the Bureau of Customs in the manner described in Section 505 and 512 of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1505, 1512 /1970/).

22. The ten percent (10%) ad valorem monies which the defendants demanded of, and took from, the plaintiff were not Customs duties, imposts and excises as described in Section 8, Article 1, of the Constitution of the United States.

23. The purpose of P.P. 4074 was not to raise revenue.

24. Section 9(a) of the TWEA authorizes any person or corporation not an enemy or ally of an enemy claiming any interest or right in any money paid into the Treasury of the United States pursuant to 50 U.S.C. App. § 5(b) to recover said money by bringing an action in equi-

ty for that purpose.

25. Under the TWEA, property taken under its authority vests under such terms and conditions as the President may prescribe.

26. The President has not prescribed any terms and conditions for, or otherwise directed, the vesting of property demanded and taken under P.P. 4074.

27. Plaintiff's property has not vested within the meaning of the TWEA.

28. Plaintiff's property claim as described herein, and as specified in Paragraph 9 of this Complaint, is stated in detail by port of entry, entry number, and amount of monies taken and claimed, in the attached Exhibit 1, a part of this Complaint. [Exhibit omitted from Appendix.]

29. The entries listed on the

attached Exhibit 2, a part of this Complaint, and included in the listing in Exhibit 1, described in Paragraph 28, are included in Court actions previously placed in Alcan Sales v. United States suspension disposition file, Court No. 72-9-01963, as indicated on said Exhibit 2. [Exhibit omitted from Appendix.]

30. The entries listed on the attached Exhibit 3, a part of this Complaint, and included in the listing in Exhibit 1 to this Complaint, are pending in this Court in the actions as indicated on said Exhibit 3. [Exhibit omitted from Appendix.]

31. The actions listed on Exhibits 2 and 3 will be the subject of a motion for consolidation, under Rule 42(a) of this Court, with this action, when this Court has acted on a pending Rule 60(b)

motion, which motion bears the lead name and Court number identification, Pacific Fast Mail v. United States, Court No. 72-8-01695, etc.

32. The defendants have refused and denied all administrative relief efforts made by plaintiff.

33. Any further efforts by plaintiff for administrative relief would be useless and vain acts, ineffective and without any purpose.

34. Plaintiff has exhausted its administrative remedies, as required by the Trading With The Enemy Act.

35. Plaintiff's property has not been returned to it.

36. Plaintiff's property has not been subjected to any freezing or blocking order under the TWEA.

37. Plaintiff is entitled to the

return of its money as it is not and was not at any time during the period of August 16, 1971, through December 20, 1971, of a status as permits the retention of its property within the terms of the TWEA.

SECOND CAUSE OF ACTION

38. Plaintiff incorporates herein as though fully set forth and realleges the allegations of Paragraph 1 through and including 34 of the First Cause of Action.

39. The refusal of the defendants to return plaintiff's property amount to an unconstitutional taking of property without just compensation and without due process of law.

THIRD CAUSE OF ACTION

40. Plaintiff incorporates herein as though fully set forth and realleges

the allegations of Paragraph 1 through and including 37 of the First Cause of Action.

41. Retention of plaintiff's property without provision for return is a taking of property for public purposes without just compensation in violation of Amendment V of the Constitution of the United States.

42. An application of the TWEA in such manner as to provide no return of plaintiff's property renders the TWEA unconstitutional as violative of Amendment V of the Constitution of the United States.

43. As no other procedure exists for having plaintiff's property returned, plaintiff is entitled to judgment ordering the release of its property.

44. WHEREFORE, plaintiff asks that

judgment be entered establishing plaintiff's right, title and interest in the money taken from it, and for entry of an order for the return to plaintiff of its money, in the amount as alleged herein, with interest thereon as provided by law, and for such other relief and orders as may seem just and proper in the premises, pursuant to 28 U.S.C. § 1361.

Dated: June 10, 1981

Respectfully submitted,

GLAD, WHITE & FERGUSON
GLAD & WHITE
GLAD, TUTTLE & WHITE

Robert Glenn White
Member of Firms
Attorneys for Plaintiffs

350 South Figueroa Street
Suite 460
Los Angeles, CA 90071
Telephone: (213) 626-8367

UNITED STATES COURT OF

INTERNATIONAL TRADE

BEFORE:

INTERNATIONAL FASHIONS, a corporation,	Court No. 81-6-00744
Plaintiff,	
v.	
ANGELA MARIE BUCHANAN, Treasurer of the United States; DONALD T. REGAN, Secretary of the Treasury Department; WILLIAM FRENCH SMITH, Attorney General of the United States; WILLIAM T. ARCHEY, Acting Commissioner of Customs, United States Customs Service,	
Defendants.	

A N S W E R

The defendants, Angela Marie Buchan-

an, Treasurer of the United States; Donald T. Regan, Secretary of the Treasury Department; William French Smith, Attorney General of the United States; and William T. Archey, Acting Commissioner of Customs, United States Customs Service, for their answer, admit, deny or otherwise plead with respect to the allegations contained in the complaint as follows:

1. The allegation contained in paragraph 1 of the complaint constitutes a conclusion of law to which no answer is required; to the extent an answer is required, the allegation is denied.

2. Deny

3. Admit that the allegation contained in paragraph 3 refers to the relief requested by plaintiff; otherwise, the allegation is denied.

4. Admit

5. Deny for lack of information sufficient to form a belief as to the truth thereof.

6. Admit

7. Admit that the merchandise imported by plaintiff into the United States during the period August 16, 1971 through December 20, 1971 included articles which were not products of Communist countries, as defined by General Headnote 3(e) of the Tariff Schedules of the United States; deny, for lack of information sufficient to form a belief as to the truth thereof, that all merchandise imported by plaintiff during this period were not products of Communist countries.

8. Admit that some merchandise imported by plaintiff during the period August 16, 1971 through December 20, 1971

was assessed with a supplemental duty amounting to 10% ad valorem; deny for lack of information sufficient to form a belief as to the truth thereof, that all such merchandise was assessed with a supplemental duty.

9. Deny; aver that no money was taken or paid to the individual defendants.

10. Deny.

11. Deny; aver that Presidential Proclamation 4074 ("PP4074") is the best evidence of its contents.

12. Deny; aver that PP4074 is the best evidence of its contents.

13. Deny; aver that cited decision is the best evidence of its content.

14. Deny; aver that the statute and decision cited are the best evidence of their contents.

15. Deny; aver that the statute and decision cited are the best evidence of their contents.

16. Deny; aver that the Constitution and the decision cited are the best evidence of their contents.

17. Deny; aver that the statutes and decision cited are the best evidence of their contents.

18. The allegation contained in paragraph 18 is a conclusion of law to which no answer is required; to the extent that an answer is required, the allegation is denied.

19. The allegation in paragraph 19 is a conclusion of law to which no answer is required; to the extent an answer is required, the allegation is denied.

20. Deny; aver that the decision cited constitutes the best evidence of

its content.

21. Deny that the Secretary of the Treasury took monies from the plaintiff; admit that the monies were deposited in the United States Treasury; otherwise, deny.

22. The allegation contained in paragraph 22 is a conclusion of law as to which no answer is required; to the extent an answer is required, the allegation is denied.

23. The allegation contained in paragraph 23 is a conclusion of law to which no answer is required; to the extent an answer is required, the allegation is denied.

24. Deny; aver that the statute cited is the best evidence of its contents.

25. The allegation contained in

paragraph 25 is a conclusion of law as to which no answer is required; to the extent an answer is required, the allegation is denied.

26. THe allegation in paragraph 26 is a conclusion of law as to which no answer is required; to the extent an answer is required, the allegation is denied.

27. Admit.

28. Admit that paragraph 28 states plaintiff's claim; otherwise, deny.

29. Deny as to Entry No. 71-817593; aver that Entry No. 71-817593 is included in Civil Action No. 80-1-00107, which was not placed in the cited suspension disposition file; otherwise, admit.

30. Admit.

31. Admit that this states plaintiff's intention; otherwise, deny.

32. Admit that all protests which plaintiff has filed have been denied; otherwise, deny.

33. Deny.

34. Deny.

35. Admit that plaintiff has not received a refund of the supplemental duty; deny that plaintiff is entitled to a refund.

36. Admit.

37. Deny.

38. Defendants incorporate by reference their responses to paragraphs 1 through 34 of the complaint as if fully set forth herein.

39. Deny.

40. Defendants incorporate by reference their responses to paragraphs 1 through 37 of the complaint as if fully set forth herein.

41. Deny.

42. Deny.

43. Deny.

44. Admit that this paragraph sets forth plaintiff's request; otherwise, deny.

FIRST AFFIRMATIVE DEFENSE

This court lacks jurisdiction to entertain this civil action.

SECOND AFFIRMATIVE DEFENSE

This civil action is barred by the statute of limitations.

THIRD AFFIRMATIVE DEFENSE

With respect to all entries listed on Exhibit 1 to the complaint, with the exception of Entries Nos. 814869 and 814-607, this civil action is barred by the doctrine of res judicata.

FOURTH AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over

Entries Nos. 81480 and 814607 due to failure of plaintiff to file a timely summons in this Court.

WHEREFORE, defendants respectfully request this Court to dismiss the complaint.

Respectfully submitted

STUART E. SCHIFFER
Acting Assistant Attorney General

DAVID M. COHEN
Branch Director
Commercial Litigation Branch
Civil Division
Department of Justice
Washington, D.C. 20530
Tel: (202) 724-7179

Attorneys for Defendant

Slip Op. 81-122

UNITED STATES COURT OF

INTERNATIONAL TRADE

INTERNATIONAL FASHIONS, a corporation,	BEFORE BOE, JUDGE
Plaintiff	COURT NO.81-6-00744
v.	
ANGELA MARIE BUCHANAN, Treasurer of the United States; DONALD T. REGAN, Secretary of the Treasury Department; WILLIAM FRENCH SMITH, Attorney General of the United States; WILLIAM T. ARCHEY, Acting Commissioner of Customs, United States Customs Service,	
Defendants.	

I. 28 U.S.C. §2636(i) providing that a civil action of which this court has jurisdiction under §1581, other than an action specified in subsections (a)-(h) thereof, is barred unless commenced within two years after the cause of action

first accrues, must be construed prospectively and not retroactively. The two-year period of time for the commencement of an action, accordingly, begins to run from the effective date of the statutory provision--November 1, 1980.

II. A cause of action created under §9(a) of the Trading With the Enemy Act relates solely to the recovery of property seized and/or vested pursuant to the Trading With the Enemy Act and is not only inapplicable, but fails to state a claim upon which relief can be granted in the instant action.

III. The surcharge imposed by Presidential Proclamation 4074 did not constitute a vesting of property within the meaning of §5(b) of the Trading With the Enemy Act nor a taking of property within the intendment of the Fifth Amendment to the Constitution of the United States.

IV. The decisions of the CCPA in the case of United States v. Yoshida International, Inc., 63 CCPA 15, 526 F.2d 560 (1975) and in the case of Alcan Sales v. United States, 63 CCPA 83, 534 F.2d 1920 (1976), cert. denied, 429 U.S. 986 (1976) are stare decisis of the issues herein.

[Motion of defendants to dismiss the above-entitled action for lack of jurisdiction, denied; motion of defendants, in the alternative, for summary judgment, granted.]

Decided: December 29, 1981

Glad, White & Ferguson; Glad & White and Glad, Tuttle & White (Robert Glenn White at oral argument and on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; (David M. Cohen, Branch Director, Commercial Litigation Branch at oral argument and on the brief, Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch at oral argument), for the defendants.

BOE, Judge: The consideration of the above-entitled action initially requires a determination with respect to the subject matter encompassed therein. The plaintiff claiming jurisdiction of this court under 28 U.S.C. §1581(i) seeks recovery of supplemental duties imposed by Presidential Proclamation 4074 on certain merchandise imported by the plaintiff into the United States between August 16, 1971 and December 20, 1971.1/

1/ For a more complete background of the surcharge issue reference is made to the related case of Alcan Sales, Div. of Alcan (con't)

Plaintiff, however, predicates its cause of action with respect to the recovery of the said supplemental duties upon the provisions of §9(a) of the Trading With the Enemy Act (50 U.S.C. app. §9(a)).

Although plaintiff annexes to its complaint exhibits 1, 2 and 3 enumerating the specific entries imported by the plaintiff as well as the amount of the supplemental duty imposed and paid in connection therewith, it appears from the records of this court that the majority of the entries set forth in the aforesaid schedules have been made a part of and are the subject of stipulations entered into between the plaintiff and the United States Government wherein it is agreed that the final determination

1/ (con't) Aluminum Corp. v. The United States, Court No. 77-8-01685, Slip Op. 81-121, decided under even date herewith.

of Alcan Sales, Div. of Alcan Aluminum Corp. v. United States, Court No. 77-8-01685 shall be binding and conclusive upon the parties as to the surcharge issue therein.

It will be noted, therefore, that only 26 of the entries set forth in exhibit 1 annexed to plaintiff's complaint represent the subject matter of the instant action in which plaintiff seeks recovery.*

Issue having been joined herein, the defendant has moved the court to dismiss this civil action for lack of jurisdiction or, in the alternative, to grant summary judgment in its favor.

* The 26 entries above-referenced to are set forth in Schedule 1 attached hereto.

In support of its motion to dismiss the instant action for lack of jurisdiction, the defendants assert that a technical amendment to the Customs Court Act of 1980, Pub. L. 96-542, 94 Stat. 3209, prevents this court from acquiring jurisdiction of the instant action under 28 U.S.C. §1581(i). The technical amendment provides that §1581(i) shall apply only with respect to civil actions commenced on or after the effective date of the Customs Courts Act of 1980--November 1, 1980. With respect to the 26 entries constituting the subject matter of the instant action, this court finds that none of said entries had been a part of a civil action filed with this court prior to its effective date of November 1, 1980. The foregoing asserted basis of defendants' motion, accordingly, cannot

be sustained.

As a further ground for its motion to dismiss the instant action for lack of jurisdiction the defendants assert the limitations relating to the commencement of civil actions contained in 28 U.S.C. §2636(i) providing:

> (i)A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

The defendants contend that inasmuch as the surcharge duties were paid by plaintiff between August 16 and December 20, 1971, the respective causes of actions seeking recovery of such payments, necessarily, accrued at the time of payment in the year 1971 -- 10 years prior to the commencement of the present action -- and

therefore barred by the foregoing statutory provision. Although it is recognized that some court decisions may suspend defendants' contention, this court is disposed to follow the interpretation by the Supreme Court of the United States with respect to statutes limiting the time of commencement of civil actions. The United States Supreme Court in the case of Sohn v. Waterson, 84 U.S. (17 Wall.)737, 738(1873) has stated:

> But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation.

Quoting from Chief Justice Taney, the

Court continued:

> "The question is,'..., from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.'

See also United States v. St. Louis, etc Ry. Co., 270 U.S. 1(1925). This court, therefore, concludes that the absence of specific statutory intent to the contrary causes §2636(i) to be construed prospectively instead of retroactively. Accordingly, the two-year period of time permitted for the commencement of a civil action pursuant to §2636(i) begins to run from the effective date of the statutory provision--November 1, 1980. The instant action having been commenced on June 11, 1981, by the filing of a summons and complaint, defendant's motion to dismiss the same must be found to be without substance

and, accordingly, denied.

Plaintiff in its complaint, while asserting jurisdiction under §1581(i), predicates its cause of action under §9 (a) of the Trading With the Enemy Act (TWEA). Section 1581(i) frequently has been characterized as a residual grant of jurisdiction to this court. Contrary to the conception that this statutory provision may have created an all-inclusive grant of jurisdiction relating to matters concerning importations and international trade, supplemental to and in addition to the jurisdictional grants expressly defined in §1581(a)-(h), examination and careful reading of subsection (i) clearly indicates the intention of the Congress to specifically delineate the nature of the "exclusive" supplemental jurisdiction therein provided. In

so doing, the Congress has extended the jurisdiction of this court only to

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for --
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

That the undisputed facts in the instant action fall within the subject matter jurisdictional grant of §1581(i)(2) and (4) is patently established by the

pleadings. The complaint of the plaintiff alleges the imposition of supplemental duties, pursuant to Presidential Proclamation 4074, on all dutiable merchandise imported into the United States. The complaint further acknowledges the payment of monies to the Treasurer of the United States amounting to 10% ad valorem on all dutiable merchandise imported by it into the United States between August 16, 1971 and December 20, 1971. Clearly, the subject matter before this court relates to duties on imports within the contemplation of §1581(i)(2). Thus the real issue confronting this court is not one of jurisdiction of the subject matter but rather whether the cause of action on which the plaintiff predicates its present claim and prayer for relief is one upon which relief can be herein granted.

The plaintiff has not challenged the validity of the imposition of the surcharge imposed by Presidential Proclamation 4074 nor taken issue with the decisions of the Court of Customs and Patent Appeals in United States v. Yoshida International, Inc., 63 CCPA 15, 526 F.2d 560(1975) and Alcan Sales v. United States, 63 CCPA 83, 534 F.2d 1920 (1976), cert. denied, 429 U.S. 896(1976), sustaining the power of the President to regulate imports by the imposition of duties pursuant to the authority granted by §5(b) of the TWEA. The gravamen of plaintiff's cause of action is the alleged continued holding and retention of property by the Treasurer of the United States belonging to a United States resident, not an enemy or an ally of an enemy of the United States. Section 9(a) of

the Act, upon which plaintiff predicates its claim, is a remedial statute of special purpose. It provides a judicial remedy only to

> (a)Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States,...

As so clearly pointed out in the case of Societe Internationale, v. Rogers, 357 U.S. 197, 211(1958), the United States Supreme Court stated:

> Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later

> judicial hearing as to the propriety of the seizure. (Citations omitted.)

A cause of action created by §9(a) of the Trading With the Enemy Act relates solely to the recovery of property seized and/or vested pursuant to the TWEA and, accordingly, not only is inapplicable but fails to state a claim upon which relief can be granted to the plaintiff in the instant action.

In the case of Alcan Sales, Div. of Alcan Aluminum Corp. v. United States, Court No. 77-8-01685, Slip Op. 81-121, under even date herewith, this court, in considering a claim for the recovery of supplemental duties imposed pursuant to Presidential Proclamation 4074, held that §9(a) of the TWEA, under which that cause of action was likewise predicated, was inapplicable to the determination of the

issue therein. The court further found the surcharge in question imposed by Presidential Proclamation 4074 was a valid exercise of authority delegated to the President by §5(b) of the TWEA to regulate importations at a time of a declared national emergency and for the specific purposes set forth with particularity in the Proclamation. The imposition of the surcharge in the instant action, as in the case of Alcan Sales, Div. of Alcan Aluminum Corp. v. United States, Court No. 77-8-01685, did not constitute a "vesting" of property within the meaning of §5(b) of the TWEA, nor a taking of property within the intendment of the Fifth Amendment to the Constitution of the United States. The reasoning of this court as more fully expressed in Alcan Sales, Div. of Alcan Aluminum Corp.,

Court No. 77-8-01685, is deemed relevant and appropriate hereto without the need of further repetition.

This court concludes that the decisions of our appellate court in the cases of United States, v. Yoshida International, Inc., supra, and Alcan Sales v. United States, 63 CCPA 83, 534 F.2d 1920 (1976), cert. denied, 429 U.S. 896(1976), are stare decisis of the issue herein.

Accordingly, the alternative motion of the defendant for summary judgment is granted.

Let judgment be entered accordingly.

Nils A. Boe
Judge

Slip Op. 81-121

UNITED STATES COURT OF

INTERNATIONAL TRADE

ALCAN SALES, DIV OF ALCAN ALUMINUM CORP.,	
Plaintiff,	Before BOE, JUDGE
v.	Court No. 77-8-01685
THE UNITED STATES,	
Defendant.	

I. The surcharge in the form of a 10% supplemental duty imposed pursuant to Presidential Proclamation 4074 was a valid exercise of authority delegated to the President by section 5(b) of the Trading With the Enemy Act to regulate importations at a time of a declared national emergency.

II. The imposition of the surcharge did not constitute an act causing a "vesting" within the meaning of section 5(b) of the Act and, accordingly, the supplemental duty paid by the plaintiff is not recoverable under the provisions of section 9(a) of the Act.

III. The decisions of the CCPA in the

case of United States v. Yoshida International, 63 CCPA 15, 526 F.2d 560 (1975) and in the case of Alcan Sales v. United States, 63 CCPA 83, 534 F.2d 1920 (1976), cert. denied, 429 U.S. 986 (1976) are stare decisis of the issues herein.

[Motion of plaintiff for summary judgment, denied; motion of defendant, in the alternative, for summary judgment, granted.]

Decided: December 29, 1981

Barnes, Richardson & Colburn (David O. Elliott, Rufus E. Jarman, Jr., and Michael A. Johnson at oral argument and on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; (David M. Cohen, Branch Director, Commercial Litigation Branch and Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch at oral argument and on the brief), for the defendant.

BOE, Judge: It, indeed, is an illustrative exercise in the art of jurisprudential survival that the surcharge issue contained in the instant action, first, having been the subject matter of litigation presented to this court and

the appropriate appellate forums,[1/] thence the subject matter of litigation presented to the U.S. District Court, District of Columbia,[2/] and the U.S. District Court for the Central District of California[3/] and their respective appellate forums, emerges again in the present proceedings.

Due to the passage of time since this issue was originally before this court, the following facts are reviewed.

1/ Yoshida International v. United States, 73 Cust. Ct. 1, 378 F. Supp. 1155 (1974), rev'd.,63 CCPA 15, 526 F.2d 560 (1975); Alcan Sales v. United States, 63 CCPA 83, 534 F.2d 920 (1976), cert. denied, 429 U.S. 986 (1976).

2/ Henry Pollack v. Blumenthal, 444 F. Supp. 56 (D.D.C. 1977), aff'd. mem., 593 F.2d 1371 (D.C. Cir.), cert. denied, 444 U.S. 836 (1979).

3/ Cornet Stores v. Morton, 632 F.2d 96 (9th Cir. 1980), cert. denied, _____ U.S. _____, 101 S. Ct. 2016 (1981).

On August 15, 1971, the President in declaring a national emergency "*** to strengthen the international economic position of the United States" issued Presidential Proclamation 4074 assessing a surcharge in the form of a supplemental duty in the amount of 10% on all imported dutiable merchandise except certain merchandise specifically exempted therefrom. 4/ The 10% surcharge was terminat-

---

4/ Presidential Proclamation 4074 in relevant part stated:

> WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;
>
> WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;
>
> * * * * * * * * *

(con't.)

ed on December 20, 1971, by Presidential Proclamation 4098 (36 Fed. Reg. 24201

4/ (con't)

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles *** provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

(1971)). The subject merchandise in the instant action was imported into the United States from Canada and entered on November 30, 1971. Upon liquidation a protest was filed by the plaintiff and a denial thereof was made by the Customs Service. A summons was timely filed in this court.

The plaintiff in the instant action does not challenge the prior decision of the CCPA in United States v. Yoshida International, 63 CCPA 15, 526 F.2d 560 (1975), in which it was determined that Presidential Proclamation 4074 was a valid exercise of the authority granted to the President by the Congress in section 5(b) of the Trading With the Enemy Act, 50 U.S.C. app. section 5(b) to regulate imports. Predicating its claim, however, under section 9(a) of the Trading With

the Enemy Act (TWEA), plaintiff now seeks recovery of the supplemental duty paid by it together with interest. The fact that it neither was nor is an enemy or ally of an enemy of the United States as defined in section 2 of the TWEA, plaintiff contends, causes the retention of the surcharge paid by it to be an unlawful "taking" and, accordingly, recoverable in this proceeding.

In bar to plaintiff's claim, the defendant asserts four principal defenses: (1) lack of jurisdiction of this court over the subject matter of the instant action, (2) the statute of limitations barring plaintiff's claim under section 9(a) of the TWEA. (3) res adjudicata and (4) collateral estoppel.

In its consideration of this cause of action the court necessarily must ini-

tially determine the validity of defendant's alleged affirmative defense that jurisdiction does not lie with this court. This jurisdictional defense of the defendant is based upon the provision contained in section 9(a) of the TWEA that in any action brought thereunder to recover property "held" and/or "vested" pursuant to section 5(b) by the United States, suit may be instituted "in the district court of the United States." Accordingly, the defendant contends, jurisdiction with respect thereto has been placed by the Congress exclusively in the United States district court.

The plaintiff asserts, and with some justification, that it has been placed on the horns of a dilemma by defendant's jurisdictional defense in light of the

circuitous journey which has been necessitated to date in connection with an attempt to seek a full judicial resolution of the surcharge issue and, in particular, with respect to the right of recovery of the supplemental duty paid by the plaintiff under the provisions of section 9(a) of the TWEA. The import of the decisions rendered in the surcharge cases adjudicated in the United States district courts and affirmed upon appellate review, in essence, held that the Customs Court, now the United States Court of International Trade, properly assumed jurisdiction over challenges to the surcharge imposed by Presidential Proclamation 4074 and that by virtue of the exclusive jurisdiction granted to this court by the provisions of 28 U.S.C. §1582 (1976), the United States district

court did not possess jurisdiction of the subject matter relating to imports.[5/]

5/ In the decisions in Pollack v. Blumenthal, supra, and Cornet Stores v. Morton, supra, the respective United States courts did not address at length the applicability of section 9(a) with respect to the recovery of property in the form of the supplemental duties imposed by the surcharge in issue and paid by the plaintiffs. Nor did the decisions therein address at length the exclusivity of the jurisdiction of the United States district court with respect to the claim brought allegedly pursuant to section 9(a), as herein asserted. Principal reference thereto is contained only by way of a footnote in the Pollack decision, stating:

> ***It is obvious on its face that 9(a) confers jurisdiction upon the federal district courts only to consider challenges to the wartime application of section 5(b) and to identifications of parties as 'enemies." Section 9(a) is not relevant to those portions of Section 5(b) which empower the President to regulate foreign trade during peacetime.

444 F.Supp. at 59-60, n.2.

Notwithstanding the plaintiff in its argument has relied principally upon the provisions of section 9(a) of the TWEA to provide the relief sought in the instant proceeding, it will be noted that among other bases the plaintff has specifically claimed jurisdiction under 28 U.S.C. §1581(a) providing:

> §1581. Civil actions against the United States and agencies and officers thereof
>
> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.[6/]

6/ Though enacted October 10, 1980, more than six years after this suit was filed, this section was made applicable to the suit at hand by Act of December 17, 1980, P.L. 96-542, 94 Stat. 3209 section (a) which declared that 28 U.S.C. §1581(a) was applicable to civil actions pending on or commenced on or after November 1, 1980.

It is by virtue of the jurisdiction acquired pursuant to the foregoing statutory provisions that this court proceeds with the determination of the instant action and, accordingly, denies the defendant's motion to dismiss the action of the plaintiff for lack of jurisdiction.

In accepting jurisdiction over the subject matter herein it cannot be said that the court is so circumscribed as to preclude its consideration of statutory provisions which may have been alleged to be applicable and/or controlling. In other words, instead of skirting the parameters of section 9(a) of the TWEA, with only oblique references thereto, this court deems it not only proper but obligatory at the outset to consider the applicability of this section of the Trading With the Enemy Act with respect

to the claim which plaintiff asserts has been neither determined on its merits in United States v. Yoshida International, supra, Alcan Sales v. United States, supra, nor in any subsequent action.

From the time of the initial enactment of the Trading With the Enemy Act, it is clear that two distinct and independent powers were conferred therein on the President by the Congress: (1)the power to "regulate" and (2)the power to "seize" and "hold" property. In the original act enacted in 1917 the former power was conferred by section 5(b), the latter power by section 7(c). It was solely with respect to the property seized and held by the direction of the President in accordance with the power conferred upon him by section 7(c) that authority was granted to a claimant, not

an enemy or ally of an enemy, by section 9 to institute a suit in equity in the district court of the United States to establish his right title or interest thereto. Through successive amendments, particularly with respect to section 5(b), the powers of the President under the TWEA were from time to time expanded. In consideration of the surcharge presently in issue, we are, accordingly, guided by section 5(b) of the Act as amended in 1941. 7/

7/ Section 5(b) of the Trading With the Enemy Act as amended on December 18, 1941 provides:

> (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of

(con't)

7/ (con't)

instructions, licenses, or otherwise --

(A) investigate, regulate, or prohibit, any transactions in foreign exhange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms,

(con't)

7/ (con't)

directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to en-

(con't)

While amendments to the respective sections of the TWEA were made from time to time, it is noteworthy that section 9(a) continued to remain without change and in its original form as enacted. This fact served as the occasion for the Supreme Court in Clark v. Uebersee Finanz-Korp., 332 U.S. 480 (1947), to

---

7/ (con't)

> force the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinafter provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

consider the relationship between section 2, section 5(b) as amended and section 9(a) of the Act and their respective applications. Although the Court therein expressly recognized that the amended section 5(b) "***granted the President the power to vest in an agency designated by him 'any property or interest of any foreign country or national thereof,'" the footnote contained in the Court's decision makes it abundantly clear that the amended section 5(b) also granted to the President the additional powers enumerated therein, specifically a regulatory power. 8/

8/ The footnote contained in the Court's decision stated:

> Section 5(b)(1), as amended, also granted the President the power to 'investigate, regulate,

(con't)

It is these two distinct independant powers that this court deems necessary to address in making a determination which, hopefully, will effect a resolution of the issue involved herein. If the imposition of the supplemental duties pursuant to Presidential Proclamation 4074 constituted an act causing a "vesting" of any property or interest of any foreign country or national thereof, then and in that event a claim for the recovery of such property might be maintained by the plaintiff under section 9(a). On the other hand, if the imposition of the

---

8/ (con't)
direct and compel, ... any ... importation ...' At 485, n.4.

See also, United States, v. Yoshida International, supra, wherein our appellate court recognized that section 5(b) granted to the President the power to "vest" as well as the power to "regulate." At 24, n.17.

supplemental duty imposed by Presidential Proclamation 4074 was in fact only an exercise of a delegated authority under section 5(b) to regulate importations during a period of national emergency, then and in that event section 9(a) and the provisions thereof are inapplicable. It is only if the applicability of section 9(a) is confirmed that it becomes necessary to reach the issue of the jurisdiction of this court thereunder.

The court concludes that plaintiff's claim predicated under section 9(a) of the TWEA is misconceived and misplaced. The provisions of section 9(a) serve a purpose directly related to the "vesting" power granted to the President by section 5(b). It is by virtue of section 9(a) that the constitutionality of the "vesting" power is insured. In Societe Inter-

nationale v. Rogers, 357 U.S. 197, 211 (1958), the United States Supreme Court stated:

> Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure. (Citations omitted.)

This court, however, has not been persuaded that the purpose and intent of the President in imposing the surcharge in question was to sequester and hold property in which any foreign country or a national thereof had an interest. Neither the declaration of the emergency by the President nor the manner of imposition of the surcharge would lend credence to such a contention. The pre-

servation of our monetary reserves, the maintenance of an international competitive position, the preservation of a favorable balance of payments position, indeed, are objectives which are not consonant with the objective of impounding foreign assets within this country. The uniform rate of supplemental duty imposed on imports from all nations without discrimination likewise fails to support any attempted rationalization that the imposition of the surcharge by the President constituted an act of appropriation of the property or property interests of a foreign nation or a national thereof creating a claim which could be asserted by a citizen of the United States instituting a legal action for the recovery thereof under the provisions of section 9(a) of the TWEA.

As afore-indicated, plaintiff has acknowledged that it does not take issue with the decision of our appellate court in the case of United States v. Yoshida International, supra. In view of this acknowledgment it is difficult to ascertain the consistency of plaintiff's contention that a determination with respect to the validity of the surcharge in question and that a recovery of the additional duties paid by the plaintiff as a result of the imposition of such surcharge now should be made in accordance with the provisions of section 9(a) of the TWEA.

The decision of our appellate court in the Yoshida case is explicit in its holding that the President was delegated the authority by section 5(b), during war or national emergency, to "regulate importation." As stated by the court

therein the sole question which remained to be determined was "what means of execution of the delegated power are permissable." 63 CCPA at 24. The court thereupon, recognizing the long-established constitutional principle that the power to tax and impose duties on imports may be employed in the exercise of the separate and distinct power to regulate commerce, upheld the validity and constitutionality of the surcharge imposed by Presidential Proclamation 4074 and the supplemental duties assessed thereunder. To again review at length the authorities supportive of our appellate court's determination in Yoshida would be only time-consuming and without significant purpose. See: Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 202 (1824); Hampton & Co. v. United States, 276 U.S. 394, 411

(1928); McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 428(1940).

However, the plaintiff in an effort to circumvent the Yoshida decision seeks refuge in the statement contained therein that "the surcharge was not imposed to raise revenue but to provide the U.S. external position with some temporary protection." 63 CCPA at 29, n. 26. Contending that the President thus was "taking" property of American citizens for the public good in time of national emergency to force foreign countries having an interest in such property to "come to terms" on an international monetary agreement, the plaintiff concludes that it has been deprived of its constitutional right of just compensation. Suffice it to say, plaintiff's argument must be found wanting in relevancy as well as in sub-

stance. The provision contained in Presidential Proclamation 4074 that the total duty, including the 10% supplemental duty, could in no event exceed the rate prescribed in column 2 of the Tariff Schedules of the United States, negates the hypothesis of the plaintiff that the imposition of the surcharge was of such an arbitrary, unreasonable and confiscatory character as to constitute a "taking" without just compensation. The incongruity of plaintiff's contention may be evidenced by the recent decision of the United States Supreme Court in the case of Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978):

> 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), and this Court has accordingly

> recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized ecomonic values. Exercises of the taxing power are one obvious example.

There are occasions, however, when certain decisions, despite the dust which might have accumulated upon their yellowed pages, place in perspective more accurately the pertinent and applicable principles of law than can be articulated in 10,000 words. In the case of Board of Trustees v. United States, 289 U.S. 48, 58-59 (1933), Chief Justice Hughes has set forth with singular clarity the distinction between the separate and independent powers to tax and lay duties and the laying of duties in the exercise of that independent power to regulate commerce.

It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. Gibbons v. Ogden, supra, p. 201. It is also true that the taxing power embraces the power to lay duties. Art. I, §8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. Gibbens v. Ogden, supra, p. 202. 'Under the power to regulate forign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' Groves v. Slaughter, 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' 2 Story on the Constitution, §1088. It has not been questioned that this power may be exerted by laying duties 'to countervail the regulations and restrictions of foreign nations.' Id., §1087. And the Congress may, and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects. Its

> requirements are not the less regulatory because they are not prohibitory or retailatory. They embody the congressional conception of the extent to which regulation should go. But if the Congress may thus exercise the power and asserts, as it has asserted here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power. The purpose to regulate foreign commerce permeates the entire congressional plan. The revenue resulting from the duties 'is an incident to such an exercise of the power. It flows from, but does not create the power.' Id.

From the explicit language of Presidential Proclamation 4074 this court is satisfied that, as stated in Board of Trustees v. United States, supra, the purpose to regulate foreign commerce under the authority delegated to him by section 5(b) permeated the entire plan of

the President.

Jurisdiction of the instant action having been acquired pursuant to 28 U.S.C. section 1581(a), the court finds that section 9(a) of the TWEA is inapplicable to the determination of the issue herein. The imposition of the surcharge in question was a valid exercise of authority delegated to the President by section 5(b) of the TWEA to regulate importations at a time of a declared national emergency and for the purposes set forth with particularity in Presidential Proclamation 4074. The imposition of the surcharge did not constitute an act causing a "vesting" within the meaning of section 5(b). No conclusion can be reached therefore by this court other than the decisions of our appellate court in the case of United States v. Yoshida

International, supra, and in the case of Alcan Sales v. United States, supra. are, in fact, stare decisis of the issues herein.

In view of the foregoing it is unnecessary to consider the additional defenses asserted by the defendant.

The motion of the plaintiff for summary judgment, accordingly, is denied. The motion of the defendant, in the alternative, for summary judgment, is granted.

Let judgment be entered accordingly.

Nils A. Boe
Judge

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATE COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

INTERNATIONAL FASHIONS, Appellant, vs. ANGELA MARIE BUCHANAN, Treasurer of the United States, DONALD T. REGAN, Secretary of the Treasury Department; WILLIAM FRENCH SMITH, Attorney General of the United States; WILLIAM T. ARCHEY, Acting Commissioner of Customs, United States Customs Service, Apellees.	App. No. 82-16

DECIDED: November 18, 1982

Before MARKEY, Chief Judge, BENNETT and SMITH, Circuit Judges.

PER CURIAM:

DECISION

The decision of the United States Court of International Trade, International Fashions v. Buchanan, 534 F. Supp. 826 (Ct. Int'l Trade 1981) granting the motion of the United States for summary judgment is affirmed.

OPINION

Appellant brought an action contending that section 9(a) of the Trading With The Enemy Act requires the United States to return the surcharges imposed on appellant's imports by Proclamation No. 4704, 85 Stat. 926 (1971). The United States Court of International Trade held that section 9(a) is inapplicable to an import surcharge program that is authorized by the regulatory provisions of section 5(b) of the Trading With the

Enemy Act. Therefore, the court granted the motion of the United States for summary judgment.

For the reasons stated in Alcan Sales v. United States, Fed. Cir. App. No. 82-17, a case decided on this same day, we conclude that appellant's section 9(a) claim is without merit as a matter of law.

Accordingly, we affirm the decision of the United States Court of International Trade and find it unnecessary to reach other issues raised by the parties.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORP.,	)	
Appellant,	)	
v.	)	Appeal No. 82-17
THE UNITED STATES,	)	
Appellee.	)	

DECIDED: November 18, 1982

David O. Elliot argued for appellant. With him on the brief were Rufus E. Jarman, Jr., Michael A. Johnson and Barnes, Richardson & Colburn.

David M. Cohen argued for appellee. With him on the brief was Assistant Attorney General J. Paul McGrath.

Before MARKEY, Chief Judge, BENNETT and SMITH, Circuit Judges.

BENNETT, Circuit Judge.

This is an appeal from a decision of the United States Court of International

Trade, Alcan Sales v. United States, 528 F. Supp. 1159 (Ct. Int'l Trade 1981). The court below held that Proclamation No. 4074 85 Stat. 926 (1971), which established a 10-percent ad valorem duty on dutiable imports, was a valid exercise of the authority delegated to the President by the Trading With the Enemy Act, 50 U.S.C. app. § 5(b), to regulate imports at a time of declared national emergency. The court below also held that section 9(a) of the Trading With the Enemy Act does not require the government to return the surcharge collected under Presidential Proclamation 4074 as that section is inapplicable to the regulatory provisions of section 5(b). The United States Court of International Trade therefore granted the government's motion for summary judgment. We affirm.

During the summer of 1971, the United

States was faced with an economic crisis. The nation suffered under an exceptionally severe and worsening balance of payments deficits. The gold reserve backing of the U.S. dollar had dropped from $17.8 billion in 1960 to less than $10.4 billion in June of 1971, reflecting a growing lack of confidence in the U.S. dollar abroad. Foreign exchange rates were being controlled by some of our major trading partners in such a way as to overvalue the U.S. dollar. That action, by stimulating U.S. imports and restraining U.S. exports, contributed substantially to the balance of payments deficit.1/

1/ The preceding account of the economic situation facing the United States in 1971 is taken verbatim from United States v. Yoshida Int'l, Inc., 526 F.2d 560, 567, (CCPA 1975) (footnotes omitted).

As part of a program to deal with this economic crisis, the President, on August 15, 1971, issued Proclamation No. 4074, 85 Stat. 926, which established an additional 10-percent ad valorem duty upon dutiable articles imported into the United States.2/ Less than 5 months later, on December 20, 1971, the surcharge program was terminated by Proclamation No. 4098, 3 C.F.R. 116 (1971 Comp.). The

---

2/ Presidential Proclamation No. 4074 states in relevant part that :

"WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

"WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

* * * * * * *

(Continued)

reason for ending the surcharge program was the formulation of a multilateral agreement (the "Smithsonian Agreement")

2/ (Continued)

"A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

"B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

"(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to a 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles *** provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedule of the United States, then the column 2 rate shall apply." [Proclamation No. 4074, 85 Stat. 926, 926-927 (1971.]

among the major industrial nations that gave promise of ending the balance of payment problem. See United States v. Yoshida International, Inc., 526 F.2d 560, 568-69 (CCPA 1975).

Unfortunately, the termination of Presidential Proclamation 4074 did not end the controversy surrounding the surcharge program. Many importers subsequently challenged the validity of Proclamation 4074, alleging that is was an ultra vires presidential act. The United States Court of Customs and Patent Appeals, however, held that Presidential Proclamation 4074 was a valid exercise of the authority delegated to the President by section 5(b) of the Trading With the Enemy Act[3/]

3/ Section 5(b) provides in relevant part that:

(Continued)

(TWEA) to regulate imports at a time of declared national emergency. See Alcan Sales v. United States, 534 F.2d 920

3/ (continued)

"(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise--

"(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national

(continued)

(CCPA), cert. denied, 429 U.S. 986 (1976); Yoshida, 526 F.2d at 584.

Following the Yoshida and Alcan Sales decisions, several importers initiated a new wave of litigation in the federal district courts. The basis for their

---

3/ (continued)

thereof any interest,

"by any person, or with repect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States ***." [50 U.S.C. app. § 5(b) (1976)]

Section 5(b) was amended in 1977, Act of Dec. 28, 1977, Pub.L. No. 95-233, tit. I, §§ 101(a), 102, 103(b), 91 Stat. 1625, 1625-26, but the amendment is not pertinent to the issues presented in this litigation.

actions was section 9(a) of the TWEA, which permits persons who are not enemies or allies of enemies to seek recovery of property seized under the TWEA.[4/] Those plaintiffs contended that section 9(a)

4/ Section 9(a) provides in relevant part that:

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or the Treasurer of the United States *** may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar

(Continued)

requires the government to return property taken under either the seizure or regulatory provisions of section 5(b) upon a showing of no enemy interest in that property. The courts that were confronted with this issue, however, held that section 9(a) does not apply to the regulatory provisions of section 5(b). See Cornet Stores v. Morton, 632 F.2d 96

4/ (Continued)

any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides ***." [50 U.S.C. app. § 9(a) (1976.]

(9th Cir. 1980), cert. denied, 451 U.S. 937 (1981); Henry Pollak, Inc., v. Blumenthal, 444 F.Supp. 56 (D.D.C. 1977), aff'd mem., 593 F.2d 1371 (D.C. Cir 1979), cert. denied, 444 U.S. 836 (1979). Because no section 9(a) claim was presented, the Cornet Stores and Henry Pollak courts held that litigation involving the surcharge program did not belong in district court, but was within the exclusive jurisdiction of the United States Customs Court under 28 U.S.C. § 1582 (1976). 5/

In response to these decisions, Alcan

5/ The Customs Court Act of 1980 changed the name of the United States Customs Court to the United States Court of International Trade. Also, section 28 U.S.C. § 1582 was repealed and replaced by 28 U.S.C. § 1581. See Customs Courts Act of 1980, Pub. L. No. 96-417, §§ 101, 201, 94 Stat. 1727, 1727-29.

Sales instituted this action in the United States Court of International Trade (formerly the United States Customs Court) seeking the return of its surcharge payments under section 9(a) of the TWEA. The court held that the TWEA confers two distinct and independent powers upon the President: (1) the power to regulate; and (2) the power to seize and hold property. See Alcan Sales v. United States, 528 F.Supp. 1159, 1162 (Ct. Int'l Trade 1981). Section 9(a)'s application, however, is limited to actions involving an exercise of the President's seizure or vesting powers under section 5(b). Because the import surcharge program was authorized by section 5(b)'s regulatory provisions, it did not constitute a vesting within the meaning of section 5(b). Therefore, the court held that section 9(a) was inapplicable to appellant's ac-

tion. The court did not purport to have any jurisdiction under section 9(a), and indeed it does not. If a section 9(a) claim had been presented, then appellant's exclusive remedy would have been in the federal district courts. See 50 U.S.C. app. §§ 7(c), 9(a) (1976).

The issue in this appeal is whether section 9(a) of the Trading With the Enemy Act (TWEA) is applicable to those provisions of section 5(b) of the TWEA that empower the President to regulate foreign trade. Every court to consider this issue has determined that it is not. See Cornet Stores, 632 F.2d at 97-98, 98 n.2; Pollak, 444 F.Supp. at 59 n.2. We agree with those decisions as well as the one now under review.

When the Trading With the Enemy Act was first enacted in 1917 its application was restricted to wartime. See Act of

Oct. 6, 1917, ch. 106, 40 Stat. 411. The purpose of the Act was to enable the President to prohibit trade with wartime enemies and to seize enemy-owned property. See Pollak, 444 F.Supp. at 59. In order to ensure that U.S. citizens would have a remedy if their property was seized under the TWEA, Congress enacted section 9(a), which established an administrative and judicial procedure by which persons who were not enemies or allies of enemies could seek recovery of property seized under the TWEA. In 1933 and again in 1941, however, Congress greatly expanded the scope of the President's powers under section 5(b) of the TWEA. See Act of March 9, 1933, ch. 1, § 2, 48 Stat. 1, 1-2; Act of Dec. 18, 1941, ch. 593, tit. III, § 301, 55 Stat. 838, 839-40. Under the amendments to section (b), the President was delegated exten-

sive powers to regulate international economic transactions involving property in which any foreign nation or citizen, friendly or otherwise, had an interest. These powers could be exercised during either a war or period of declared national emergency. Therefore, after 1941, it was clear that section 5(b) conferred two distinct and independent powers upon the President: (1) the power to seize or "vest" property; and (2) the power to regulate.

Although Congress chose to expand significantly the President's authority under section 5(b), it did not concurrently amend the recovery provisions of section 9(a). For that reason, section 9(a) must be construed to apply as originally enacted-- to those provisions of section 5(b) that empower the President to vest property. See Cornet Stores, 632

F.2d at 97.

Common sense also dictates that section 9(a) retain its original limitations. In amending section 5(b), Congress delegated broad and extensive powers to the President in order that he could deal effectively with national emergency situations. See Yoshida, 526 F.2d at 573. Extending section 9(a) to the regulatory provisions of section 5(b), however, might severely hinder the President's ability to deal effectively with a national emergency. In this case, for example, it is doubtful that the surcharge program imposed by Presidential Proclamation 4074 would have been effective if section 9(a) required the government to return the surcharges it collected. The purpose of a surcharge on imports is to decrease the demand for foreign goods by increasing the price to consum-

ers. If importers know that they will receive a refund of any surcharges paid, then they will be less likely to pass the cost of the surcharge through to consumers. A surcharge progam subject to section 9(a) would thus be less effective in descreasing the demand for foreign goods and alleviating a balance of payments problem. Therefore, it seems highly unlikely that Congress would give the President broad regulatory powers under section 5(b) in order that he could deal effectively with national emergencies and then subject these powers to section 9(a), which might render the delegated powers useless.

Thus, section 9(a) "confers jurisdiction upon the federal district courts only to consider challenges to the wartime applications of Section 5(b) [i.e. the seizure or vesting of property] and

to identifications of parties as 'enemies'." Pollak, 444 F. Supp. at 60 n.2. It is inapplicable to a surcharge program on imports that is authorized by the regulatory provisions of section 5(b). See Cornet Stores, 632 F.2d at 97-98, 98 n2; Pollak, 444 F. Supp. at 60 n.2.

Although section 9(a) does not apply to the regulatory provisions of section 5(b), it does not necessarily follow that the United States Court of International Trade is the proper forum for all actions arising under the regulatory provisions of section 5(b).6/ A court must first characterize the action. Only if the

---

6/ The regulatory provisions of section 5(b) delegate broad and varied powers to the President, which permit the President to engage in a wide range of economic regulations. Some of the President's regulatory actions may come within the jurisdiction of the federal district (Continued)

section 5(b) action bears a "substantial relation to traditional customs purposes," Jerlian Watch Co. v. United States, 597 F.2d 687, 691, (9th Cir. 1979), will the United States Court of International Trade have jurisdiction. As this is the case here, litigation involving the import surcharge program is within the exclusive jurisdiction of the United States Court of International Trade. See Cornet Stores, 632 F.2d at 100; Pollak 444 F. Supp. at 59-60. Prior litigation under former section 1582 (now

---

6/ (Continued)
courts, while others may be within the exclusive jurisdiction of the United States Court of International Trade. See Henry Pollak, Inc. v. Blumenthal, 444 F. Supp. 56, 59 (D.D.C. 1977), aff'd mem., 593 F.2d 1371 (D.C. Cir. 1979), cert. denied, 444 U.S. 836 (1979).

section 1581)[7/] has conclusively established that Presidential Proclamation 4074 was a valid exercise of the authority delegated to the President under the regulatory provisions of section 5(b). See Alcan Sales, 534 F.2d at 920; Yoshida, 526 F.2d at 584.

Appellant now contends, however, that the United States Court of International Trade has jurisdiction under section 1581 to hear its section 9(a) claim and to return its surcharge payments notwithstanding the validity of Presidential Procla-

---

7/ Section 1581 contains the major jurisdictional grants of authority to the United States Court of International Trade. It substantially restates, with some modifications, the jurisdictional authority of the former United States Custom Court under 28 U.S.C. § 1582. See H.R. REP. NO. 1235, 96th Cong., 2d Sess. 44-48, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3729, 3755-60.

mation 4074. This argument is without merit. For the reasons stated above, section 9(a) is irrelevant to litigation involving an import surcharge program established under the regulatory provisions of section 5(b). In fact, the inapplicability of section 9(a) to section 5(b)'s regulatory provisions is one of the reasons why the United States Court of International Trade has exclusive jurisdiction over this matter.

Therefore, after thorough consideration of the parties' submissions and after oral argument, the decision of the United States Court of International Trade granting the government's motion for summary judgment is affirmed.

AFFIRMED

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 5(b), 50 U.S.C. App. (1970):

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise--

> (A) investigate, regulate or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent, or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exersising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President,...

Section 7(c), 50 U.S.C. App. (1970):

> (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, chooses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, tranferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix].
>
> Any requirement made pursuant to this Act [sections 1-6, 7-39 and 41-44 of this Appendix], or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or

assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trademarks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an

enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [section 1-6, 7-39 and 41-44 of this Appendix], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States. (Brackets quoted).

Section 9(a), 50 U.S.C. App. (1970):

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which

may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property.

If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. ***

28 U.S.C. §1585, as added by Pub.L. 96-417, 94 Stat. 1730:

> The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

Office-Supreme Court, U.S.
FILED
APR 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1403

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL FASHIONS, PETITIONER

v.

ANGELA MARIE BUCHANAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1403

INTERNATIONAL FASHIONS, PETITIONER

v.

ANGELA MARIE BUCHANAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that Section 9(a) of the Trading With The Enemy Act ("TWEA"), 50 U.S.C. App. 9(a), authorized it to bring an action to recover an import surcharge lawfully imposed by the President under Section 5(b) of that Act, 50 U.S.C. App. (& Supp. V) 5(b).

1. In 1971, the President imposed a 10% ad valorem surcharge on most dutiable imports. Proclamation No. 4074, 3 C.F.R. 60 (1971-1975 Comp.). The United States Court of Customs and Patent Appeals upheld the validity of the surcharge as an exercise of the President's authority under Section 5(b)(1) of the TWEA, 50 U.S.C. App. 5(b)(1), to regulate imports "[d]uring [a] period of national emergency declared by the President." *United States* v. *Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975); *Alcan Sales, Div. of Alcan Aluminum Corp.* v. *United States*, 534 F.2d 920 (C.C.P.A.), cert. denied, 429 U.S. 986 (1976) ("*Alcan I*").

2. Petitioner International Fashions sought to recover surcharges imposed under the Presidential proclamation by filing an action pursuant to Section 9(a) of the TWEA in the Court of International Trade (Pet. App. 1a). That court rejected petitioner's claim as controlled by *Yoshida* and *Alcan I* (Pet. App. 26a, 42a). The court of appeals affirmed per curiam on the basis of its decision in *Alcan Sales, Div. of Alcan Aluminum Corp.* v. *United States*, 693 F.2d 1089 (Fed. Cir. 1982) ("*Alcan II*"), petition for cert. pending, No. 82-1384, which was handed down that same day (Pet. App. 75a-76a). In *Alcan II*, the court held that Section 9(a) of the TWEA does not authorize an action in the Court of International Trade to recover the surcharge imposed by Proclamation 4074. The court also held that its prior decisions in *Yoshida* and *Alcan I* conclusively established the validity of that surcharge. See also *Cornet Stores* v. *Morton*, 632 F.2d 96 (9th Cir. 1980), cert. denied, 451 U.S. 937 (1981); *Henry Pollak, Inc.* v. *Blumenthal*, 444 F.Supp. 56 (D.D.C. 1977), aff'd mem., 593 F.2d 1371 (D.C. Cir.), cert. denied, 444 U.S. 836 (1979).

3. Petitioner in this case raises no issue not also raised in the petition in *Alcan II*, No. 82-1384. The petition in this case should therefore be denied for the reasons stated in the Memorandum for the United States in Opposition in *Alcan II*.*

---

*A copy of the Memorandum in Opposition in *Alcan II* is being served upon counsel for petitioner in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1983

DOJ-1983-04